

ARIZONA JUDICIAL COUNCIL

Request for Council Action

**Date Action
Requested:**

December 9, 2021

**Type of Action
Requested:**

☒ Formal Action/Request
☐ Information Only
☐ Other

Subject:

Report from the Capital
Case Oversight
Committee

FROM:

Capital Case Oversight Committee
Hon. Ronald Reinstein (ret.)
Committee Chair

DISCUSSION:

The Capital Case Oversight Committee was established by a Supreme Court Administrative Order in 2007. It has been continually extended to the present time following its periodic reports to the Arizona Judicial Council.

The Oversight Committee was originally formed to address an "unprecedented number" of pending capital cases in Maricopa County. More recently, it has focused on identifying issues affecting the administration of capital cases and proposing recommendations to improve the administration of those cases.

RECOMMENDED COUNCIL ACTION:

Approve the Oversight Committee's report and a recommendation to extend the Committee's term.



December 2021

Report of the Capital Case Oversight Committee to the Arizona Judicial Council



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CCOC - Capital Case Oversight Committee

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Supreme Court Administrative Order No. 2019-29 extended the term of the Capital Case Oversight Committee's to December 31, 2021. As required by that Order, the Oversight Committee submitted an interim report to the Arizona Judicial Council in December 2020. The interim report contained no recommendations. This second report contains a single recommendation.

1. **Background.** The Oversight Committee has a long history. The Committee's predecessor was the Capital Case Task Force, which was established on February 12, 2007, by Administrative Order No. 2007-18. That Order noted an "unprecedented number of capital cases currently awaiting trial in Maricopa County." The Order directed the Capital Case Task Force to "examine the issues relevant to the availability of adequate resources for processing capital cases in Maricopa County and in the appellate courts of Arizona and make recommendations for rule and statutory amendments that would promote efficient resolution of these cases in light of the pending caseload...."

The Capital Case Task Force submitted a report and recommendations to the Arizona Judicial Council in September 2007. Its concluding recommendation was that the Arizona Supreme Court establish a committee to monitor capital caseload reduction efforts in Maricopa County. The Supreme Court accordingly established the Capital Case Oversight Committee on December 6, 2007, by the entry of Administrative Order 2007-92. Justice Ryan served as chair of the Oversight Committee until his passing in 2012, and Judge Reinstein has served as the successor chair.

This Court has extended the term of the Capital Case Oversight Committee by a succession of administrative orders, some of which expanded the Committee's scope to issues of statewide concern and added members outside of Maricopa County. The Oversight Committee's objectives also have become broader than monitoring case reduction efforts. Administrative Order No. 2019-29 provides that the Committee "continue to identify issues affecting the administration of capital cases and propose recommendations to improve the judicial administration of these cases." The Oversight Committee has submitted ongoing reports to the Arizona Judicial Council and has worked to accomplish the specified objectives.

The number of capital cases depends on a variety of factors. Two of those factors — the number of aggravated murders, which is random, and the charging policies of elected prosecutors, which can change over time — are beyond the Court's control. Over the past decade, however, judicial officers, prosecutors, and defense counsel have collaborated in capital case reduction efforts and have achieved commendable results. The most apparent reason for the reduction is that prosecutors are filing fewer notices of intent to seek the death penalty.

As of August 2007, there were 149 pending capital cases in Maricopa County (Task Force report at page 3). By comparison, as of the end of August 2021, there were 41 capital cases in Maricopa County, or a reduction of more than 70%. Each capital case represents a significant commitment of time, money, and resources by both the judicial and executive branches, and a reduction of more than 100 cases is significant.

As of August 2008, there were 27 pending capital cases in the other fourteen counties. By August 2021, that number had dropped to 10 cases, a reduction of more than 60%. Statewide, including Maricopa County, the number of capital cases has been reduced by two-thirds between 2008 and 2021.

2. **Data Superior Court.** For several years (2008 to 2012), capital cases were pending in 7 of Arizona's 15 counties. But as of September 2021, the great majority of the counties have no pending capital cases. This is due, in part, by a recognition in some counties of the extraordinary cost of these cases and the reluctance of those counties to devote substantial resources to a single case.

Counties with no pending cases:

Five Arizona counties (*Coconino, Graham, Greenlee, LaPaz, and Navajo*) have not had a capital case since 2008, when the Oversight Committee first began tracking statewide data.

Gila and *Santa Cruz* counties did not have a capital case between 2008 and 2019. In 2019, each of these counties filed a single notice of intent to seek the death penalty. The *Gila* case was a multiple homicide, and the *Santa Cruz* case involved the murder of a police officer. Both cases resolved by plea agreements with life sentences, and neither county currently has a capital case.

Mohave County had between zero and 3 capital cases pending between 2008 and 2017. Two defendants were sentenced to death during that period, but those cases were remanded. In 2018, the County Attorney filed a motion in each case to withdraw the death notice, citing, among other reasons, that "even if the State is successful in the death penalty phase, there is no reasonable likelihood of the death penalty actually being imposed." Since then, *Mohave County* has not initiated any new capital cases.

Pima County had 14 pending capital cases in 2008. By 2011, the number had dropped by 50 percent, to 7 cases. In 2015, there were 5 pending cases. There were no pending capital cases in *Pima County* in 2017. In 2018 there was one case, and in 2019 there were 3 cases. There were two pending cases noted in the Oversight Committee's December 2020 report, but now there are none. The newly elected County Attorney withdrew the notices of intent to seek the death penalty in both of those pending cases earlier this year.

Counties with pending cases:

Maricopa County accounts for most of Arizona's capital cases. In 2008, when the Oversight Committee began collecting data, there were 127 pending capital cases in Maricopa County. (As noted above, there were more than 140 pending cases during the term of the Capital Case Task Force.) By 2011, following judicial implementation of new policies for capital case management, the number dropped to 68 pending cases. The number stood at 48 cases in the fall of 2018, 43 cases in the fall of 2019, and 38 in the fall of 2020. The 2021 survey showed 41 pending capital cases in Maricopa County. This modest increase was probably due to the pandemic, which began in about March 2020 and is ongoing. (The first capital case trial in Arizona since the onset of the pandemic began in Maricopa County in October 2021.) Still, the number of currently pending Maricopa capital cases is about a third of the number of cases that were pending in 2008.

In fiscal years 2018 (July 2017 to June 2018), 2019, 2020, and 2021, the Maricopa County Attorney respectively filed 7, 7, 6, and 5 new notices of intent to seek the death penalty. By comparison, for FY 2008, 2009, 2010, and 2011, there were 32, 29, 23, and 27 new notices filed. The recent reductions in new death notices have been a core contributor to the lower number of pending capital cases in Maricopa County.

Maricopa County's Office of Public Defense Services reported in October 2021 that it has assigned defense teams to 67 cases. This number includes the 41 pending capital cases mentioned above, 14 cases in which the parties have submitted stipulations for extensions of time to file notices of intent to seek the death penalty, and about two dozen first degree murder cases under review by the County Attorney for the potential filing of notices of intent.

Pinal County is the sole county whose number of pending capital cases has increased since 2008. In 2008, it had 3 cases. In 2013, the number increased to 10 cases, and in 2014, it peaked at 17. At the time of the Oversight Committee's 2018 report, the number had dropped to 7, and there are currently 6 cases. (One case resolved subsequent to the autumn 2021 survey.) One of the current cases has been pending for 11 years. Notwithstanding the number of pending capital cases since 2008, no death sentences have been imposed in Pinal County during that interval, or, for that matter, since 1990.

Yavapai County had 3 capital cases in 2008, and as many as 7 cases during 2013-2014. As of September 2020, it had one pending capital case. In August 2021, it added a second case involving a double homicide.

Yuma County had 5 pending capital cases in 2008, but the number steadily declined. In 2017, one defendant was sentenced to death, and for several years thereafter there were no pending capital cases in Yuma County. However, the Yuma County Attorney filed a death notice in September 2021 in a double homicide case.

Petitions for post-conviction relief. There are more than 40 petitions for post-conviction relief pending in trial courts throughout Arizona. All of these petitioners are represented by counsel; there is no backlog in appointments, as there has been in previous years. The majority of these post-conviction petitions are initial petitions, but a significant number are successive petitions. Maricopa County has 29 pending capital case petitions for post-conviction relief; 19 of these are initial petitions and 10 are successive petitions. There are also 58 pending habeas proceedings involving Arizona death penalty cases in the federal district court (which has 32 cases) and in the Ninth Circuit (where there are 26 cases).

3. **Data: Supreme Court.** The Arizona Supreme Court has had variable numbers of pending capital cases during the past 13 years.

As of November 2008, there were 17 direct appeals of capital convictions pending in the Arizona Supreme Court. By October 2009, that number had increased to 23 capital appeals. As of September 2018, that number decreased by almost half, to 12 pending direct appeals. One notice of appeal was filed in 2020. No notices have been filed during 2021 to-date. There are currently 6 direct capital appeals pending in the Arizona Supreme Court. The Supreme Court also has 7 pending capital case petitions for review.

The Department of Corrections website indicates that there are now 114 inmates on Arizona's death row. The Arizona Attorney General indicated during an October 2021 Oversight Committee meeting that 22 death row inmates have exhausted their appeals. The Attorney General intends to request the Court to issue death warrants in at least two cases after drug protocol issues have been resolved.

4. **Effect of the Pandemic; Workgroups.** Inasmuch as there were no capital jury trials during the ascendancy of the pandemic in 2020 and its continuation into 2021, the October 2021 Oversight Committee meeting was its first since December 2019. There also was limited progress in capital PCRs during this period due to travel restrictions and the related inability to interview witnesses.

The Oversight Committee has established two workgroups. The membership of these workgroups includes Oversight Committee members as well as non-member stakeholders. A workgroup on capital case jury selection will convene after the other workgroup, on capital case jury instructions, has completed its work. Although the most rational order would be to do jury selection first rather than second, the decision to defer jury selection was, in hindsight, appropriate. At its August Rules Agenda, the Court in rule petition number R-21-0020 eliminated provisions in Criminal Rules 18.4 and 18.5 that abrogated peremptory challenges of potential jurors in a criminal case. This change, which becomes effective January 1, 2022, will probably impact capital case juries.

Peremptory challenges are significant in capital case jury selection, and this workgroup could have meaningful suggestions for dealing with the absence of those challenges.

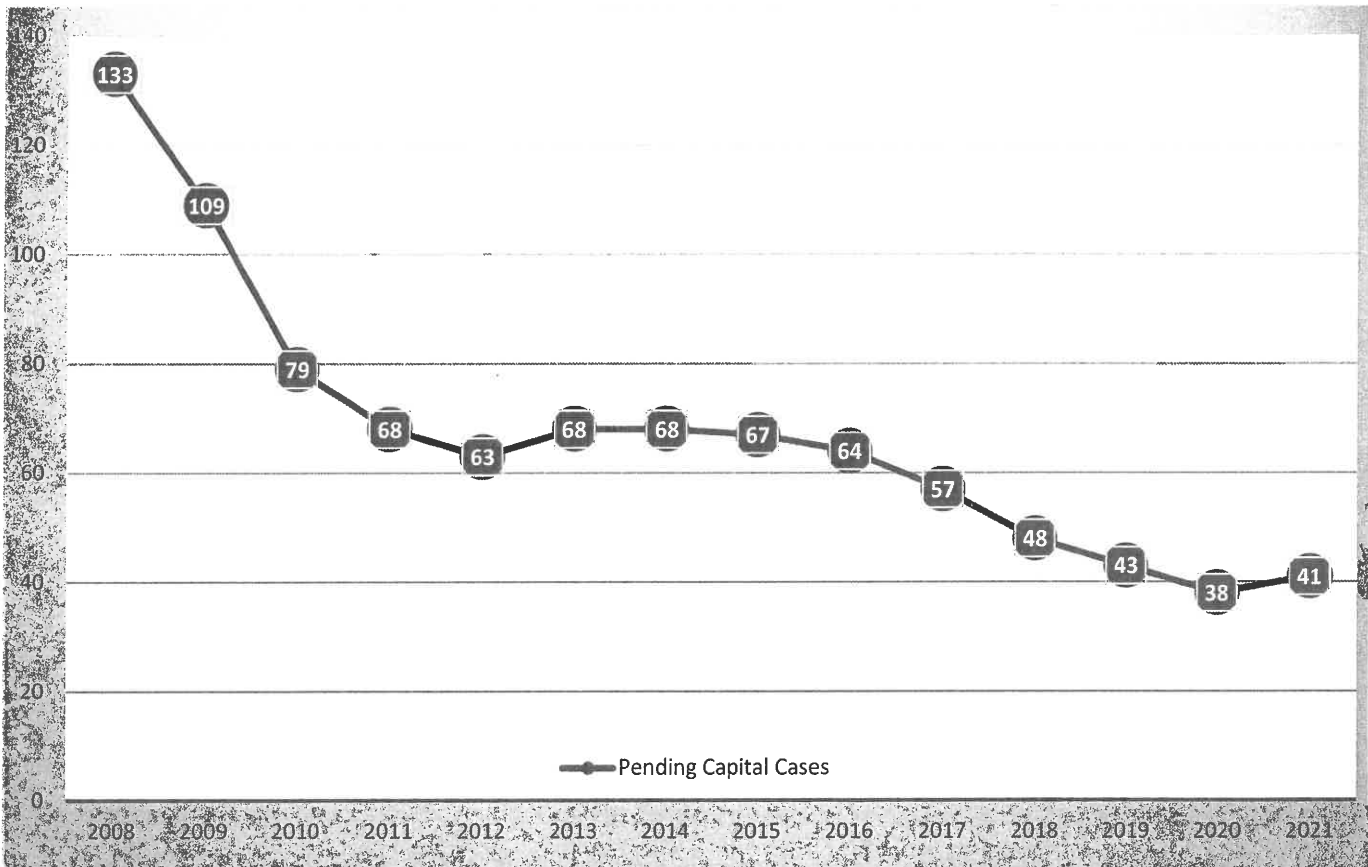
The other workgroup, concerning capital case jury instructions, held its first meeting on October 8, 2021. Judge Patricia Starr leads the workgroup. The workgroup's dozen members include a Supreme Court justice, a Court of Appeals judge, 4 superior court judges, as well as prosecutors and defense counsel. The first meeting was also attended by Dr. Robert Leonard, a professor of linguistics at Hofstra University, who shared his insights and suggestions. Members agreed during that meeting to review not only the penalty phase instructions, as originally anticipated, but also the aggravation phase instructions. The workgroup's primary objective is to revise these instructions to make them more understandable to lay jurors, while also correctly articulating legal requirements.

5. **Recommendations.** The Oversight Committee has a single recommendation: that the Court extend the Committee's term. An extension is appropriate because the Committee's workgroups have just begun their work, and they should continue their work in the coming months under the umbrella of the Oversight Committee. An extension of the Committee's term was discussed at the October 2021 meeting, and members overwhelmingly supported the extension. The members' comments noted that the Oversight Committee should exist for as long as Arizona has the death penalty; that the Committee offers a forum for communicating and discussing issues regarding death penalty litigation; and that the Committee "keeps a finger on the pulse of capital litigation." One member observed that the Oversight Committee might be valuable in ways we cannot fully appreciate now.

The Committee recommends, however, that if the Court adopts this recommendation and extends the Oversight Committee's term, that it should authorize the Committee to be flexible in setting its meetings, that is, that the members could meet on an "as needed" basis, as determined by the Chair. Also, because members change jobs or assignments over the long term, the Committee recommends that the appointment order designate, where appropriate, categories of members, such as the Maricopa County Superior Court presiding judge, rather than a named judge. Doing so would mitigate the need to request the Court to enter a new administrative order for a new member appointment whenever a personnel change occurs.

Appendix

#1. Number of Capital Cases Pending Trial in the Maricopa County Superior Court: September 2008–September 2021



#2. Capital Cases Pending Trial in Arizona by County: 2008 to 2021

These annual surveys were conducted in late August and early September, except 2008, which was conducted in July.

	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019	2020	2021
Apache	1	1	0	0	0	0	0	0	0	0	0	0	0	0
Cochise	0	0	1	3	3	2	1	0	0	0	0	0	0	0
Coconino	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Gila	0	0	0	0	0	0	0	0	0	0	0	1	1	0
Graham	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Greenlee	0	0	0	0	0	0	0	0	0	0	0	0	0	0
LaPaz	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Maricopa	127	109	79	68	63	68	68	67	64	57	48	43	38	41
Mohave	2	3	2	1	1	0	0	2	2	2	0	0	0	0
Navajo	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Pima	14	13	10	7	5	6	6	5	2	0	1	3	2	0
Pinal	3	4	5	5	5	10	17	14	12	8	9	7	7	7
Santa Cruz	0	0	0	0	0	0	0	0	0	0	0	1	0	0
Yavapai	3	2	2	2	5	7	7	3	2	2	4	1	1	2
Yuma	5	4	3	3	1	1	1	1	1	0	0	0	0	1
TOTAL	155	136	102	89	83	94	100	92	83	69	62	56	49	51

Counties shown with gray shading had no pending capital cases during the 2021 survey.

#3. Number of Defendants Sentenced to Death Statewide

<u>Year</u>	<u># of Defendants</u>	<u>Source by County</u>
2008	5	Maricopa (5)
2009	15	Maricopa (11), Pima (3), Mohave (1)
2010	10	Maricopa (10)
2011	8	Maricopa (6), Pima (2)
2012	4	Maricopa (3), Pima (1)
2013	4	Maricopa (3), Mohave (1)
2014	3	Maricopa (3)
2015	3	Maricopa (3)
2016	1	Maricopa (1)
2017	4	Maricopa (3), Yuma (1)
2018	2	Maricopa (2)
2019	1	Yavapai (1)
2020	1	Maricopa (1)
2021 [9 months]	0	--
2008-2018	61	Maricopa (51), Pima (6), Mohave (2), Yuma (1), Yavapai (1)

#4. Number of Executions in Arizona

<u>Year</u>	<u># of Executions</u>
2001-2006	0
2007	1
2008	0
2009	0
2010	1
2011	4
2012	6
2013	2
2014	1
2015 - 2020	0
2021 [9 months]	0
2001-2021	15

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Report and Recommendations of the Capital Case Oversight Committee

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